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IN THE

Supreme Court of the United States

October Term, 1966

No. 370

INTER-AMERICAN CITIZENS FOR DECENCY COMMITTEE, ET AL.,

Petitioners,

versus

ANDY W. McBEATH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO.

INTER-AMERICAN CITIZENS FOR DECENCY COMMITTEE, ET AL.,

Petitioners,

versus

ANDY W. McBEATH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, dated March 13, 1967, and issued as mandate in the above case on April 28, 1967.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 374 F. 2d 359.

Jurisdiction

The Judgment of the Court of Appeals for the Fifth Circuit was made March 13, 1967, and issued as Man-

date on April 28, 1967, and the Order of said Court overruling petitioners' motion for a rehearing was made and entered on April 28, 1967, and copies of each are appended to this Petition in the Appendix.

The Jurisdiction of this Court is invoked under 28 USC 1254 (1).

Questions Presented

In the District Court, among other relief, respondent sought a preliminary injunction against Petitioners, and Petitioners moved for dismissal of the cause for lack of jurisdiction. Respondent announced ready on the preliminary injunction matter, and respondent also announced that he was ready to go forward with existence on the jurisdictional question.

The District Court held a preliminary hearing and separate trial of the jurisdictional issue, and respondent was accorded full opportunity to present such evidence as he desired, and respondent in fact did present his evidence and rested.

The District Court found the evidence presented insufficient to make federal jurisdiction and dismissed the case. The court of appeals reversed and remanded. The questions presented are:

1. Whether the District Court may hear and determine the question of its jurisdiction in a preliminary hearing under Rule 12(d) and Rule 42 (6) of the Federal Rules of Civil Procedure, before trial, in a suit

involving a cause of action under 15 USC Sections 1, 15 and 26.

2. Whether the District Court may hold a separate trial of the Jurisdictional issue under Rule 42 (b) of the Federal Rules of Civil Procedure in a suit invoking a cause of action under 15 USC Sections 1, 15 and 26.

If the above questions are answered in the negative no other question need be decided. If either is answered in the affirmative then the following questions remain:

3. Whether the burden of proof is on the Plaintiff in a private civil anti-trust case.

4. Whether the District Court was correct in finding that the evidence presented was insufficient to invoke federal jurisdiction.

5. Whether the District Court was correct in dismissing this cause for lack of jurisdiction.

STATUTES AND FEDERAL RULES INVOKED.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . . 15 USC 1.

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 15 USC 15.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: . . . . 15 USC 26.

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. 28 USC 1337.

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses

may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter . . . .

(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1) — (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

2. Rule 12 (b) and (d) Federal Rules of Civil Procedure.

(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . . Rule 15 (b) Federal Rules of Civil Procedure.

(d) SEPARATE TRIALS. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 42 (b) Federal Rules of Civil Procedure.

STATEMENT

This is a private civil anti-trust action based upon 15 USC Secs. 1, 15 and 26, and 28 USC 1337.

The District Court separately tried and heard the evidence directed to the issue of jurisdiction, and granted Petitioners' Motion to Dismiss, holding the evidence insufficient to invoke federal jurisdiction. *THE DISTRICT COURT ACCORDED FULL OPPORTUNITY TO RESPONDENT TO PRESENT HIS EVIDENCE ON THE ISSUE OF JURISDICTION.*

An appeal to the Court of Appeals reversed, holding specifically that in a case alleging a violation of the Sherman Act, the District Court cannot properly determine the question of Jurisdiction prior to a trial on the merits by preliminary hearing under Rule 12 (d) of the Federal Rules of Civil Procedure, and further holding by implication at least, that a separate trial of the jurisdictional issue on this type of case cannot be held by the District Court under Rule 42 (b) of the Federal Rules of Civil Procedure.

By way of dicta the Court of Appeals stated that the allegations that respondent had suffered pecuniary loss were corroborated at the hearing. It is respectfully submitted that the Court of Appeals has read the record incorrectly on this point in referring to a dwindling from 50 inches of ads to 12 inches in June, 1965, and 8 inches in July, 1965 (SR 49, 50) as cor-

roborating the allegations as to respondents' loss. The record contains nothing, alleged or proven, that would indicate that Petitioners engaged in any activity complained of prior to July 29, 1965, and further, the record contains no evidence tending to show that a loss of advertising subsequent to July 29, 1965, which could have been or was caused by any action of Petitioners.

The Court of Appeals further commented in its opinion that, although there was oral testimony, it was not sufficiently complete for the Court to make a proper determination of the jurisdictional question. This in effect shifts the burden of proof from the Plaintiff to either the District Judge or the Defendants, as respondent had full opportunity to present his evidence before he rested.

REASONS FOR GRANTING THE WRIT

1. The decision rendered by the Court below should be reviewed because it is in conflict with the decision of the Court of Appeals of the Ninth Circuit in Page V. Work 290 F. 2d 323, and with the decision of the Court of Appeals of the Second Circuit in Lieberthal v. North Country Lanes, Inc., 332 F 2d 269.

2. The decision rendered by the Court below should be reviewed because it has decided an important question of Federal Law which has not been, but should be decided by this Court.

The holding of the Court below requires, in spite of the provisions of Rules 12 (d) and 42 (b) of the Federal Rules of Civil Procedure that the District Court must defer ruling on the jurisdictional issue in all private civil actions brought under the Anti-Trust Laws of the United States. This holding effectively prevents the Trial Judge from exercising the discretion specifically provided in the cited rules.

The decision of this court in Land v. Dollar, 330 U.S. 731, involved a ruling made on the Court's own motion before issue was joined; on an entirely different jurisdictional question than is involved in this case; whereas in the instant case issue had been joined (R page 7), Petitioners had made a Motion to Dismiss for Lack of Jurisdiction, (R page 45), and a full opportunity was accorded respondent to present evidence, and respondent in fact presented evidence, on the Jurisdictional point. (SR pages 2 through 51).

Petitioners have found no opinion of this Court that decides the questions presented here.

No extended discussion is necessary to point out either the importance of this question to the trial courts and the parties in the conduct of a case of this nature or the probable adverse effect on the efficient administration of Justice at the trial court level if the decision of the Court below is allowed to stand.

CONCLUSION

For the reasons set forth above, it is respectively submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23,372

ANDY W. McBEATH,

Appellant,

versus

INTER-AMERICAN CITIZENS FOR DECENCY COMMITTEE, ET AL.,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(March 13, 1967.)

Before TUTTLE, Chief Judge, and AINSWORTH and DYER, Circuit Judges.

AINSWORTH, Circuit Judge: This private civil antitrust action alleges a violation of the Sherman Act, 15 U.S.C. 1, by defendants, acting in concert with one another to restrain interstate and foreign trade unlawfully, which actions are said to have injured and continue to injure plaintiff-appellant McBeath. Jurisdiction is invoked under 28 U.S.C. 1337 which confers

jurisdiction on district courts of any civil action arising under any Act of Congress protecting trade and commerce against restraints, and under the Clayton Act, 15 U.S.C. 15, which also authorizes such a suit and provides for treble damages sustained by reason of injury resulting from violations of antitrust laws. McBeath seeks injunctive relief as provided by 15 U.S.C. 26, and treble damages as provided by 15 U.S.C. 15. Defendants moved to dismiss for lack of jurisdiction, and after a hearing on the motion, the district court, without assigning reasons, ordered the suit dismissed. We reverse and remand.

McBeath is the owner, editor and publisher of a weekly newspaper, the Eagle Pass News Guide, published in Eagle Pass, Texas, and circulated principally in Eagle Pass and Piedras Negras, Coahuila, Mexico. Eagle Pass and Piedras Negras are separated by the international boundary line of the United States and Mexico. The complaint alleges that the individual defendants have organized the defendant organization "Inter-American Citizens for Decency Committee" and that the organization and the individual defendants have conspired and are conspiring to exert pressures upon persons who advertise with plaintiff; that such pressure is in the nature of an organized boycott against plaintiff's advertisers designed to intimidate, coerce and prevent them from doing business with him; that as a result of the boycott, lawful foreign trade has been restrained, plaintiff has been damaged in the present sum of $3,000, and destruction of his business is threatened. McBeath alleges that the coercive campaign is being carried on by the pub-

lication of inflammatory statements in two newspapers published in Piedras Negras, by messages broadcast daily over KEPS Radio Station in Eagle Pass, of which one defendant, Wheeler, is an employee, and by handbills and circulars. It is also alleged that KEPS Radio Station and the two newspapers published in Piedras Negras are in competition with him with respect to advertising purchased by various businesses in the two communities.

Interrogatories were propounded to the four individual defendants, the answers to which show the following: Three of the defendants, Wheeler, Mijarez and Miguel, are officers of the Inter-American Citizens for Decency (sued here, however, as "Inter-American Citizens for Decency *Committee*"); Hume, the remaining individual defendant, was employed by the organization to represent it as counsel. The organization was formed on August 4, 1965. Hume feared that the criticism of McBeath and various statements might be construed as a boycott and warned the President of the organization, Wheeler, and others against the use of such statements. Statements were in fact issued to the press on behalf of the organization, the nature of which is not of record. The organization also purchased radio time for announcements on Radio Station KEPS. The record also fails to disclose the nature of the announcements.

At the hearing on October 27, 1965 of the motion to dismiss, proof was made that the Eagle Pass News Guide is operating in interstate and foreign commerce. Out of a total of 2,100 newspapers, approxi-

mately 200 are sold out of state, 26 or 27 of which are mailed to foreign countries. National as well as local advertising is published. The allegations that McBeath has suffered pecuniary loss were corroborated at the hearing. Losses in advertising occurred. McBeath formerly printed a maximum of 50 inches of Mexican advertising weekly. In June 1965 this advertising dwindled to approximately 12 inches, and in July to 8 inches. At the time of the hearing he had only one 2-inch Mexican advertisement. Advertising sells for a maximum of 84 cents an inch.

The question which we are called upon to decide is the correctness of the district court's ruling in dismissing the suit for lack of jurisdiction without hearing the merits of the case, where allegations of a violation of the Sherman Act and resultant damages have been made but no proof has been offered as to the alleged violation and the causal connection between the violation and the damages sustained.

For an aggrieved party to state a claim for relief under the Sherman Act it is necessary to allege only a per se violation of the Act. In a treble damage action, allegations of a per se violation plus resultant damages must be made. In *Radiant Burners, Inc. v. Peoples Gas Lgt. & Coke Co.*, 364 U. S. 656, 660, 81 S. Ct. 365, 367, 5 L. Ed. 2d 358 (1961), in reversing the Seventh Circuit which had affirmed the district court's dismissal of a suit alleging a conspiracy designed to exclude the sale of plaintiff's gas heaters from the public market, the Supreme Court held that by Section 1 of the Sherman Act ". . . Congress has made

illegal: 'Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States * * *.' Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 31 S. Ct. 502, 515, 55 L. Ed. 619. Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. *Therefore, to state a claim under which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.*" (Emphasis supplied.) The complaint of McBeath clearly meets the test applied in *Radiant Burners, Inc.* He has alleged a conspiracy in the form of a boycott in restraint of trade and the substance of these allegations indicates a secondary boycott. He has also alleged damages resulting from the unlawful acts. It is well established that conspiracies and boycotts are proscribed activities under Section 1 of the Sherman Act. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959), the Supreme Court, in reversing the Ninth Circuit which had affirmed the district court's dismissal by summary judgment of a complaint alleging a boycott, said (359 U. S. 212) that "Group boycotts . . . have long been held to be in the forbidden category," citing as authority *Eastern State Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600, 34 S. Ct. 951, 58 L. Ed. 1490; *Binderup v. Pathe Exchange, Inc.*, 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 61 S. Ct. 703, 85 L. Ed. 949; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 214, 71 S. Ct. 259, 261, 95 L. Ed.

219; *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594, 625, 73 S. Ct. 872, 889, 97 L. Ed. 1277; *Northern Pacific Ry. Co. v. United States*, 356 U. S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545. Secondary boycotts are also prohibited by Section 1 of the Sherman Act. See *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1921).

Needless to say, the proscribed violation and the resultant damages must be proved for the aggrieved party to prevail. It was understood both by the lower court and the parties that the hearing on the motion was to determine the jurisdictional issues alone. The record shows that counsel for McBeath was prepared to offer evidence on the merits of the case at the conclusion of the jurisdictional issues. Following the final arguments of counsel on the jurisdictional question the court summarily dismissed the suit and later entered an order without assigning reasons for his finding that the court lacked jurisdiction. Proof was made at the hearing that the Eagle Pass News Guide operated in interstate and foreign commerce; that the foreign commerce of the business had been affected; and that McBeath had suffered pecuniary losses during the period in which the alleged violations occurred.

Defendants' principal contention is that without proof that the conduct complained of directly and substantially affects the interstate commerce of McBeath's business, the court lacks jurisdiction over the matter. Defendants rely principally on *Page v. Work*, 9 Cir., 1961, 290 F. 2d 323, cert. den. 368 U. S. 875, 82 S. Ct. 121, 7 L. Ed. 2d 76 (1961), in which the Court of

Appeals upheld a judgment dismissing a civil antitrust action for treble damages for want of jurisdiction and held that "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." The *Page* case is readily distinguishable from the instant one. In a hearing on the jurisdictional issue the court found from the evidence that defendant's newspaper was primarily engaged in the publication of legal advertising; that this was a purely local activity directed to a local intrastate market, relating to a product (legal advertisement) not in the flow of interstate commerce; and accordingly that the court lacked jurisdiction. The product involved in the instant case, the publication of news as well as advertising secured from both Texas and Mexico, is not directed solely to a local intrastate market. It is further noted that in *Page, supra,* there were "extensive pretrial discovery proceedings and conferences, culminating in a pretrial conference order containing 30 pages of admitted facts." In order to determine the issue of jurisdiction the court in *Page* fully considered the merits of the case, which it necessarily was obliged to do in a matter of this kind. There was, therefore, an abundance of evidence before the court. Here, though there was oral testimony it was not sufficiently complete for the court to make a proper determination of the jurisdictional question. In our view it was necessary for the court to consider more extensively the merits of the controversy, particularly in connection with the alleged violations of the antitrust laws, in order to make a proper determination of jurisdiction.

Undoubtedly, under Rule 12(d) of the Federal Rules of Civil Procedure a court may determine the prerequisites to jurisdiction in advance of a trial on the merits. However, where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits, for it is impossible to decide the one without the other. In *Land v. Dollar,* 330 U. S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947), the Supreme Court recognized that there were types of cases "where the question of jurisdiction is dependent on decision of the merits." In *Schramm v. Oakes,* 10 Cir., 1965, 352 F. 2d 143, the court held that "where the issue of jurisdiction is dependent upon a decision on the merits . . . the trial court should determine jurisdiction by proceeding to a decision on the merits." The Sixth Circuit in *Fireman's Fund Ins. Co. v. Railway Express Agency,* 1958, 253 F. 2d 780, 784, said, "Where the jurisdictional issue . . . can not be decided without the ruling constituting at the same time a ruling on the merits of the case, the case should be heard and determined on its merits through regular trial procedure." While the three cited cases involved a question of jurisdiction not pertinent here, we feel as the Sixth Circuit did in *Fireman's Fund Ins. Co.* that "the principles to be applied in each instance are substantially similar."

The question of jurisdiction here, including the existence of a conspiracy and a boycott or secondary boycott and their significant effect on interstate commerce, is so inextricably connected with the merits of the case itself that it was error for the court to determine that it lacked jurisdiction, thereby dismissing

the suit, without according McBeath a full opportunity to prove his case on the merits, particularly considering the incomplete record and the paucity of evidence before the court.

The allegations of the complaint expressly allege a violation of the Sherman Act in the form of a boycott and the substance of the complaint alleges a secondary boycott. The complaint further alleges that the acts complained of affected and are affecting the interstate commerce of the business and have caused McBeath to sustain losses. Answers to the interrogatories propounded to defendant Hume show that every time a statement was issued by the defendant President of the organization and others, he considered it necessary to warn them repeatedly against making statements that could be construed as constituting a boycott. McBeath should have been allowed to develop this evidence in a full hearing on the merits where the issue of jurisdiction and the merits are so closely tied together and inseparable. It was error for the court summarily to preclude him from so doing.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23,372

D. C. Docket No. CA 373

ANDY W. McBEATH,

Appellant,

versus

INTER-AMERICAN CITIZENS FOR DECENCY COMMITTEE, ET AL.,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, Chief Judge, and AINSWORTH and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here or-

dered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered and adjudged that the appellees, Inter-American Citizens for Decency Committee, Et Al, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 13, 1967

Issued as Mandate: Apr. 28, 1967

Court Costs:	
Docketing cause, etc.	$25.00
Cost of Printing Record	$362.50
Total	$387.50

[360] — Ainsworth

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23,372

Filed: Apr. 20, 1967

ANDY W. McBEATH,

Appellant

v.

INTER-AMERICAN CITIZENS FOR
DECENCY COMMITTEE, ET AL.,

Appellees

Appeal from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING

(April 20, 1967)

Before TUTTLE, Chief Judge, and AINSWORTH and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellees' petition for rehearing in this cause is hereby DENIED.

SUPREME COURT, U. S.

SEP 14 196

JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

October Term, 1967

No. 370

INTER-AMERICAN CITIZENS FOR DECENCY COMMITTEE, ET AL.,

Petitioners,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
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---

Respondent prays that a Writ of Certiorari be denied.

QUESTIONS PRESENTED

In addition to the questions presented for review by the petition for certiorari, one other question is presented:

1. Whether the District Court erred in not allowing petitioner an adequate opportunity for discovery in accordance with Rule 26 (e) of the Local Court Rules of the United States District Court for the Western District of Texas.

STATUTES AND FEDERAL RULES INVOKED

1. Rule 26 (e) Local Court Rules of the United States District Court for the Western District of Texas.

> (e) Completion of Discovery. In all civil cases, except in patent, anti-trust and trademark cases, all discovery shall be completed within three months after the case is at issue. In patent, anti-trust, and trademark cases, discovery shall be completed within six months after the case is at issue.

STATEMENT

This is a private anti-trust action based upon 15 USC Secs. 1, 15, and 26, and 28 USC 1337.

The District Court separately tried and heard the evidence directed to the issue of jurisdiction,

and granted petitioners' motion to dismiss, holding the evidence insufficient to invoke federal jurisdiction.

The Court of Appeals reversed, holding that in a case alleging a violation of the Sherman Act, the District Court in a preliminary hearing under Rule 12 (d) of the Federal Rules of Civil Procedure must allow a full presentation of the factual issues which are relevant to the jurisdictional issue.

The Court of Appeals further commented in its opinion that, although there was oral testimony, it was not sufficiently complete for the Court to make a proper determination of the jurisdictional question. Contrary to the statement in the instant petition, this comment did not shift the burden of proof to the District Judge or the defendants. The sole effect of this statement was to insure that the plaintiff had adequate time to prepare his evidence on the intermeshed factual issues which go to the merits as well as to jurisdiction.

It was not possible at a preliminary hearing for respondent to have a full opportunity for complete development of the jurisdictional issues to the extent that such issues are inseparable from the facts on the merits.

ARGUMENT

1. The judgment of the Court of Appeals should not be disturbed in that sufficient evidence to acquire jurisdiction was submitted in the preliminary

hearing. That there was sufficient evidence is supported by several cases, including a decision of this Court. The leading cases are: Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181 (1951); Evening News Publishing Co. v. Allied Newspaper Carriers of New Jersey, 263 F. 2d 715 (3rd Cir. 1959) cert. den. 360 U. S. 929; Greenspun v. McCarren, 105 F. Supp. 662 (D. Nev. 1952). In all these cases the activities were essentially local in the sense that the newspapers involved did not have a wide circulation, yet the courts found adequate jurisdiction in each case.

There is no conflict, as petitioner contends, with the instant case and the decision of the Court of Appeals for the Ninth Circuit in Page v. Work, 290 F. 2d 323 (9th Cir. 1961) cert. den. 368 U. S. 875. The Court below adequately distinguished Page in that in the hearing on the jurisdictional issue "the court found from the evidence that the defendant's newspaper was primarily engaged in the publication of legal advertising; that this was purely a local activity directed to a local intrastate market." 374 F. 2d at 362. In the instant case, both the news and the advertising were not directed at solely an intrastate market. It should also be noted, regarding Page, that the Ninth Circuit seems to have a narrow view of anti-trust jurisdiction which was reversed both in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705 (1959) and Radovich v. National Football League, 352 U.S. 445,77 S. Ct. 390 (1957).

Moreover, there is no conflict with the decision

of the Court of Appeals for the Second Circuit in Lieberthal v. North County Lanes, Inc., 332 F. 2d 269 (2d Cir. 1964). In Lieberthal both the trial court and the Court of Appeals agreed that the interstate activity would have been a "one-shot" affair which could not, of itself, convert the primarily local business into an activity which had a direct and substantial effect on interstate commerce. On the contrary, the uncontroverted, undisputed, clear-cut evidence in the instant case is well within the jurisdictional facts of Lorain and Greenspun.

2. Even if sufficient evidence was not submitted on the jurisdictional issue, the District Court should have considered more extensively the merits of the case. As the Court below correctly decided, where the factual and jurisdictional issues are completely intermeshed, "the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other." 374 F. 2d at 363. In support of this well-settled proposition the Court of Appeals cited: Land v. Dollar, 330 U.S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947); Schramm v. Oakes, 352 F. 2d 143 (10th Cir. 1965); Fireman's Fund Ins. Co. v. Railway Express Agency, 253 F. 2d 780 (6th Cir. 1958).

Here, as before, there is no conflict with Page The Court below adequately distinguished Page on the grounds that there were "extensive pre-trial discovery proceedings and conferences, culminating in a pre-trial conference order containing 30 pages of admitted facts." Clearly, in light of the above

cited cases, McBeath should have been given the opportunity to present his evidence in a hearing on the merits.

The petitioners' contention that the Court of Appeals held that the District Court could not properly determine the question of jurisdiction prior to a trial on the merits by preliminary hearing under Rule 12 (d) of the Federal Rules of Civil Procedure inaccurately describes the scope of Court of Appeals' decision. The Court below acquiesced, at least by implication, to the "extensive pre-trial discovery proceedings" used in the Page case under 12 (d). Consequently, the scope of the Court of Appeals opinion was merely to insure that abundant evidence is submitted to the Court when the factual and jurisdictional questions are intermeshed.

3. Petitioner incorrectly submitted that the District Court accorded full opportunity to respondent to present evidence on the issue of jurisdiction. On the contrary, respondent was obviously given inadequate time to prepare evidence on both the factual and jurisdictional issues. The cause was set for hearing on plaintiff's application for preliminary injunction some 54 days after suit was filed. The hearing on the motion to dismiss was held one day after the motion was filed (R, pp.45 and 53). The local rules of court allow 6 months discovery time in anti-trust cases. Rule 26 (e), Local Court Rules of the United States District Court for the Western District of Texas.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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